

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES**

In the Matter of the Order to Forfeit a Fine of the
License of Jennifer Larson
4243 Fayre Road
Duluth, MN 55803
No. 208765
to provide family child care under Minnesota
Rules, parts 9502.0300 to 9502.0445

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 9:30 a.m. on Friday, April 16, 2004, at the St. Louis County Attorney's Office, Room 403 Government Services Building, 320 West Second Street, in Duluth, Minnesota. The OAH record closed when the hearing ended on April 16, 2004.

Joseph M. Fischer, Assistant St. Louis County Attorney, Room 403 Government Services Building, 320 West Second Street, Duluth, Minnesota 55802-1495, appeared at the hearing as attorney for St. Louis County (the County) and the Minnesota Department of Human Services (the Department). Denese Kopnick, 4243 Fayre Road, Duluth, Minnesota 55803, was not represented by an attorney and appeared at the hearing on her own behalf.

NOTICES

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minnesota law,^[1] the Commissioner may not make his final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file exceptions and present argument to her. Parties should contact the office of Kevin Goodno, Commissioner of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155, to find out how to file exceptions or present argument.

The record of this contested case proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.^[2]

STATEMENT OF ISSUE

Whether Mrs. Kopnick should forfeit a fine of \$200 for violating the Department's rules that apply to providers of family child care.^[3]

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. During all times important to this proceeding, Denese Kopnick and her husband, Brian Kopnick, resided at 4243 Fayre Road, Duluth, Minnesota 55803. Since 1994, Mrs. Kopnick has been licensed to provide family child care at that address. Her license has been renewable every two years.^[4]

2. The first record of a potable water test of the well currently in use on the Kopnick's property was filed by the County on July 9, 1990. At that time, Mr. Kopnick described it as a dug well, 10 ft. deep, with a 12-inch concrete casing and a metal cover.^[5] A well of that construction does not meet existing state standards, which require a depth of 15 feet and an impermeable casing.^[6]

3. On July 9, 1990, Mr. Kopnick reported to the County that the well was not being used for normal household needs.^[7] On July 10, 1990, the County's Health Department conducted a test of the Kopnick's well water and determined that the total count of coliform bacteria was 7 parts per 100 milliliters, which was above maximum limits.^[8] Nitrate nitrogen was reported as being less than 1 milligram per liter, which was within normal limits.^[9] The nitrate nitrogen results of tests conducted on the Kopnicks' well water have never exceeded the maximum limits of 10 milligrams per liter.^[10]

4. The next recorded test of the Kopnicks' well water was on July 1, 1994, about the time that Mrs. Kopnick was first licensed to provide family day care at 4243 Fayre Road in Duluth.^[11] At that time, the total coliform count was less than 1/100ml, which was within acceptable limits.^[12]

5. In connection with relicensure between July 1, 1994, and September 21, 2000, the County did not require Mrs. Kopnick to produce annual tests of her well water by a certified laboratory.^[13]

6. On August 30, 2002, the Kopnicks had their well water tested by the County's Department of Public Health. That test indicated a total coliform value of 5/100ml, which was above acceptable limits.^[14]

7. Jean Taran became Mrs. Kopnick's day care licensing licensor in August 2002, and on September 19, 2002, she visited Mrs. Kopnick at her home and, among other things, gave her a safety checklist to fill out. Mrs. Kopnick filled out the safety checklist at that time and indicated that there was a safe water supply in her residence, and that a certified laboratory had tested the water from her well annually.^[15]

8. In May 2003, Ms. Taran sent Mrs. Kopnick a packet of materials relating to renewal of her day care license. Included in that packet was a kit to be used for a well water test. Mrs. Kopnick was asked to use the kit to obtain a sample of well water and return it to the County's Department of Public Health for testing in accordance with enclosed instructions.^[16] Also included was a Family Child Care Licensing Checklist for Mrs. Kopnick to complete.^[17]

9. On July 31, 2003, Mrs. Kopnick completed the Family Child Care Licensing Checklist that had been sent to her, and she returned it to her licensor on or about August 12, 2003.^[18] In response to Question 12 on the checklist, Mrs. Kopnick stated that she did have well water, and that the date of the most recent test was "7-03."^[19]

10. Mrs. Kopnick did not have any testing done of her well water in August 2003.^[20]

11. When the County had not received the testing results by August 28, 2003, Mrs. Kopnick's licensor called her about testing results. At that time Mrs. Kopnick stated that she had not yet conducted the well water test, but that she would do so and bring the sample to the County laboratory for testing that day.^[21]

12. Mrs. Kopnick had not provided her licensor with any testing results of her well water by September 15, 2003. Consequently, the County issued a correction order to her on that date that, among other things, cited her for a violation of the rule^[22] requiring her to file a copy of annual well water tests with the licensing agency.^[23] The correction order requested Mrs. Kopnick to correct the items listed, to sign and date the correction order, and to return it to her licensing worker.^[24] Mrs. Kopnick did not take the actions required by the correction order until January 29, 2004.^[25]

13. On September 22, 2003, Mrs. Kopnick obtained a sample of her well water and transmitted it to the County's Department of Public Health for testing.^[26] That agency's laboratory tested the sample, and on September 23, 2003, reported the results to Mrs. Kopnick. The results indicated a total coliform count of 23/100ml, well above the acceptable limits of less than 1/100 ml.^[27] Mrs. Kopnick did not provide a copy of those test results to her family child care licensing agency.^[28]

14. By October 20, 2003, Mrs. Kopnick had not yet returned the correction order that had previously been issued to her and had not provided the County with any

indication that the violations cited in that order had been corrected. Consequently, after consultations with the Department's Licensing Division, the County issued a second correction order to Mrs. Kopnick on that date, again citing her failure to provide the licensing agency with proof of an annual well water test.^[29]

15. On November 7, 2003, Mrs. Kopnick's family day care licensor had not yet received any response to the correction order of October 20, 2003. The County therefore made a written recommendation that the Department take negative action against Mrs. Kopnick's family day care license—namely, that “Mrs. Kopnick be fined \$100. The County also recommended that her license be conditional until she provides documentation that her drinking water meets Family Child Care safety requirements.”^[30]

16. On November 12, 2003, Mrs. Kopnick obtained another sample of her well water and transmitted it to the County's Department of Public Health for testing.^[31] That agency's laboratory tested the sample, and on November 13, 2003, reported the results to Mrs. Kopnick. The results indicated a total coliform count of 3/100ml, which was still above the acceptable limits of less than 1/100 ml.^[32]

17. On November 20, 2003, Mrs. Kopnick advised her licensor by letter that she had obtained a test of her well water, and that the test results indicated a total coliform count of 3/100ml, which was above the acceptable limit of less than 1/100ml. Mrs. Kopnick further indicated that they were going to disinfect the well and then conduct another test, and that she had been using bottled water for the potable water needs of her family and day care children.^[33]

18. On November 21, 2003, the licensor wrote a letter to Mrs. Kopnick forwarding additional water testing materials and indicating that the County was accepting Mrs. Kopnick's letter of November 20, 2003, as a request for a variance to use bottled water. The licensor indicated that the variance would end when testing results indicated that the well water was safe to drink.^[34]

19. After attempting to disinfect the well, on November 25, 2003, Mrs. Kopnick obtained yet another sample of her well water and transmitted it to the County's Department of Public Health for testing.^[35] That agency's laboratory tested the sample, and on November 26, 2003, reported the results to Mrs. Kopnick. The results indicated a total coliform count of 11/100ml, which was still above the acceptable limits of less than 1/100 ml.^[36]

20. On December 30, 2003, the County advised Mrs. Kopnick by letter of its recommendation that the Department take negative action against her license for her failure to provide her licensing agency with documented testing of her well water.^[37]

21. On January 13, 2004, Mrs. Kopnick sent an e-mail message to her licensor inquiring whether the County wanted a copy of the result of her well water test, whether a variance was in effect, and what further steps needed to be done.^[38] In an e-mail reply of the same, Ms. Taran informed Mrs. Kopnick of what further steps needed to be taken.^[39]

22. On January 13, 2004, the Department issued an Order to Forfeit a fine of \$200 and an Order of Conditional License based on a violation of a licensure rule requiring her maintain a safe water supply in her day care home and to provide her licensing agency results of annual well water testing.^[40]

23. On January 19, 2004, Mrs. Kopnick requested reconsideration of the order, but the Department subsequently denied reconsideration.^[41]

24. It was not until January 29, 2004, that Mrs. Kopnick actually provided her licensing agency with copies of the results of the tests of her well water that had been performed on November 13 and 26, 2003.^[42]

25. Mrs. Kopnick subsequently made a timely appeal of the Department's orders to forfeit a fine and to issue a conditional license, and that appeal has resulted in this contested case proceeding.

26. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

27. The Memorandum that follows explains the reasons for these Findings of Fact, and to the extent that the Memorandum may contain additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

28. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law gives the Administrative Law Judge and the Commissioner authority to conduct this contested case proceeding and to make findings, conclusions, and recommendations or a final order, as the case may be.^[43]

2. The Department and the County gave proper and timely notice of the hearing, and it has also fulfilled all procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge.

3. The Department has the burden of demonstrating reasonable cause for the fine imposed on Mrs. Kopnick's family day care license.^[44] And at the hearing, the Department did establish reasonable cause for that negative licensure action.

8. Mrs. Kopnick therefore has the burden of proving by a preponderance of the evidence that she was in full compliance with any licensure rules that the Order to Forfeit a Fine indicates were violated at the time those violations allegedly occurred.^[45]

9. Minnesota Rules, part 9205.0445, subdivision 1, provides that:

Subpart 1. **Water.** There must be a safe water supply in the residence.

A. Water from privately owned wells, must be tested annually by a Minnesota Health Department certified laboratory for coliform bacteria and nitrate nitrogens to verify safety. The provider shall file a record of the test results with the agency. Retesting and corrective measures may be required by the agency if results exceed state drinking water standards or where the supply may be subject to off-site contamination.

B. Drinking water must be available to the children and offered at frequent intervals in separate or single service drinking cups or bottles.

10. Mrs. Kopnick failed to establish by a preponderance of the evidence that she was in full compliance with Minnesota Rules, section 9205.0445, subdivision 1, at the times the Department alleged that she violated that licensure rule.

11. Child care license holders who receive an order of conditional license have the right to request that the Commissioner reconsider that order:

“The license holder may request reconsideration of the order of conditional license by notifying the commissioner by certified mail. The request must be in writing and must be received by the commissioner within ten calendar days after the license holder received the order.”^[46]

But license holders who receive an order of conditional license do not have a right to obtain an administrative hearing to challenge that order:

“The commissioner's disposition of a request for reconsideration is final and not subject to appeal under chapter 14.”^[47]

12. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

13. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

(1) The Administrative Law Judge therefore respectfully RECOMMENDS that the Commissioner AFFIRM the Department's Order to Forfeit a Fine dated January 13, 2004.

Dated this 26th day of April 2004.

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape Recorded (two tapes); No Transcript Prepared.

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NOTICE

Under Minnesota law,^[48] the Commissioner of Human Services is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

At the hearing, Mrs. Kopnick essentially conceded that she had violated Minnesota Rules, part 9205.0445, subdivision 1A by not filing a record of annual well water test results with her licensing agency.^[49] What she seems to be challenging in this proceeding is the severity of the sanctions that the Department is proposing. She suggested that the \$200 fine might be appropriate, but that conditional licensure was not warranted. However, as previously indicated, an order for conditional license cannot be challenged in a contested case hearing. The only recourse that the legislature allows is a request for reconsideration.

The legislature has indicated that when imposing licensing sanctions, “the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.”^[50] [Emphasis supplied.] The Department’s rules go further and require consideration of several specific factors:

- A. the laws or rules that have been violated;
- B. the nature and severity of each violation;
- C. whether the violation is recurring or nonrecurring;
- D. the effect of the violation on persons served by the program;
- E. an evaluation of the risk of harm to persons served by the program;
- F. any evaluations of the program by persons served or their families;
- G. relevant facts, conditions, and circumstances concerning the operation of the program; and
- H. any aggravating or mitigating factors related to the violation.^[51] [Emphasis supplied.]

By way of mitigation, Mrs. Kopnick first argued that the violation was inadvertent and the result of a miscommunication. It appears that Mrs. Kopnick’s well water was tested in July 1994 when she first applied for a license to provide family day care at 4243 Fayre Road, a country location outside of Duluth.^[52] The initial testing indicated a coliform bacteria level of less than 1/100ml, which was within acceptable limits. Then, for reasons that are not clear, the County did not require her to produce annual testing results until the summer of 2003, when her license was coming up for renewal. There was evidence that Mrs. Kopnick had had the well water tested the year before on August 30, 2002. That testing indicated that the coliform bacteria level in her well water

did exceed allowable limits. Mrs. Kopnick suggested that the August 30, 2002, test met the annual testing requirement. But even if it did, she did not provide the results of that test to her licensing agency, as required by the rule.

Mrs. Kopnick further testified that her understanding of what she was being asked to do in 2003 was to provide the County with well tests that met acceptable standards for coliform bacteria level. Since none of the four well tests that were done between August 30, 2002, and November 26, 2003, showed that levels of coliform bacteria were acceptable, she indicated her belief that the County was not interested in receiving the results of those tests. There was some evidence in the record that tended to corroborate such a misunderstanding.^[53] On the other hand, the plain language of the rule and the checklists that she completed for relicensing do not lend much support to her interpretation.

But the real issue here is the safety of her day care children. At the hearing, Mrs. Kopnick suggested that she had actually been using bottled water for the potable water needs of her family and day care children for some extended period of time. In other words, she suggested that although she might have violated the rule, the health of her day care children had never really been at risk. There is some evidence tending to corroborate that testimony. In the initial water testing application form that Mr. Kopnick submitted to the County on July 9, 1990,^[54] he indicated that the well was not being used for normal household needs. That tends to corroborate what Mrs. Kopnick said at the hearing about her use of bottled water. Additionally, in her November 20, 2003, letter to Jean Taran,^[55] Mrs. Kopnick stated, "I have been using bottled water and will continue to do so until my well test comes back approved." In short, both Mrs. Kopnick's testimony and the corroborating evidence were ambiguous about when she began using bottled water to meet the potable water needs of her day care children. So whether or not her day care children had ever been exposed to the risk of contaminated water is not completely clear.

The Department has an important interest in ensuring consistency in application of sanctions. Here, some new facts came to light during the hearing that might bear on the severity of the penalty. Although the ALJ is recommending that the fine be affirmed, the Commissioner is in better position to determine whether any discrepancies between the facts that were alleged and the facts that have actually been found should affect the nature of the sanction.

B. H. J.

^[1] Minnesota Statutes, section 14.61 (2002). (Unless otherwise specified, citations to Minnesota Statutes refer to the 2002 edition.)

^[2] See Minnesota Statutes, section 14.62, subdivision 2a.

[3] Minnesota law gives a child care licensee the right to an administrative contested case hearing in connection with appeal of a fine. But there is no right to a hearing to appeal a conditional license. See the discussion in Conclusion No. 11 and in the Memorandum that follows.

[4] Testimony of Jean Taran.

[5] Exhibit 1. At the hearing, Mrs. Kopnick testified that the well's indicated depth of 10 feet was an error, and that the well is actually deeper.

[6] Testimony of Russell Georgesen.

[7] Exhibit 1.

[8] Exhibit 1; testimony of Russell Georgesen. (Total coliform testing results will hereafter be reported as "7/100ml.")

[9] Exhibit 1; testimony of Russell Georgesen.

[10] *Id.*

[11] Exhibit 1; testimony of Jean Taran.

[12] Exhibit 1.

[13] Exhibit 3; testimony of Jean Taran.

[14] Exhibit 1; testimony of Russell Georgesen.

[15] *Id.*

[16] Testimony of Jean Taran.

[17] *Id.*; Exhibit 2.

[18] Exhibit 2.

[19] Exhibit 2 at p. 12.

[20] Exhibit 1; testimony of Russell Georgesen.

[21] *Id.*; testimony of Jean Taran.

[22] Namely, Minnesota Rules, pt. 9502.0445, subpart 1A. (Unless otherwise specified, all references to Minnesota Rules are to the 2003 edition.)

[23] Exhibit 4.

[24] *Id.*

[25] Testimony of Jean Taran.

[26] Exhibit 1.

[27] Exhibit 1.

[28] Testimony of Jean Taran and Denese Kopnick.

[29] Testimony of Jean Taran; Exhibit 5.

[30] Exhibit 6; testimony of Jean Taran.

[31] Exhibit 1.

[32] Exhibit 1.

[33] Exhibit 7. See discussion of the evidence in the Memorandum that follows.

[34] Exhibit 8.

[35] Exhibit 1.

[36] Exhibit 1.

[37] Exhibit 10.

[38] Exhibit 12.

[39] *Id.*

[40] Minnesota Rules, part 9502.0445, subpart 1.

[41] Exhibit 13.

[42] Exhibit 11.

^[43] Minnesota Statutes, sections 14.50, 14.57, 14.69, and 245A.01 through 245A.16.

^[44] Minnesota Statutes, section 245A.08, subdivision 3.

^[45] Minnesota Statutes, sections 245A.08, subdivision 2a.

^[46] Minnesota Statutes, section 245A.07, subdivision 4.

^[47] Minnesota Statutes, section 245A.07, subdivision 4.

^[48] Minn. Stat. § 14.62, subd. 1.

^[49] Testimony of Denese Kopnick.

^[50] Minn. Stat. § 245A.07, subdivision 1.

^[51] Minnesota Rules, part 9543.1060, subpart 2. Correction of violations would seem to fall within items G. and H.

^[52] Exhibit 1; testimony of Denese Kopnick and Jean Taran.

^[53] See, for example, Exhibit 7.

^[54] Exhibit 1.

^[55] Exhibit 7.